

APPEAL NO. 022789
FILED DECEMBER 17, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 9, 2002. The hearing officer determined that the compensable injury of _____, does not extend to include psychological problems (depression/chronic pain) and/or injuries to the cervical spine, left upper extremity, and/or lower back; that the respondent (carrier) did not waive its right to dispute the extent of the claimed injury by not disputing the additional claimed body parts in a legally sufficient manner; and that the appellant (claimant) made an effective election of remedies with respect to workers' compensation benefits when he elected to sign a release of claim in return for proceeds from the lawsuit. The claimant appeals and the carrier responds, urging affirmance.

DECISION

Reversed and rendered in part, affirmed in part.

It is undisputed that the carrier accepted a compensable injury on _____, to the claimant's right shoulder and groin; a review of medical records as well as the claimant's initial claim show this to be the asserted scope of injury for several years following the incident. There were a number of medical opinions concerning the relationship of the claimant's later contended cervical and psychological problems to his July 1995 injury.

However, the claimant had also sustained a 1991 injury for which he had had surgery prior to 1995. The claimant filed a lawsuit in March 1995 in district court against the employer alleging that the employer violated Art. 8307c of the Texas Workers' Compensation Act (recodified as Section 451.001 *et seq.* of the Labor Code), relating to discrimination against employees for filing workers' compensation claims. In 1999 this lawsuit for discrimination was settled with the employer for \$100,500. Of that amount, \$50,250 was stated to be for "emotional distress." The attorney who represented the claimant in this lawsuit testified by telephone that the release signed by the claimant was expressly discussed with opposing counsel and it was agreed that it would not affect the claimant's pending workers' compensation claim for the July 1995 injury.

Shortly after the settlement and release was signed, the claimant began to actively assert that he had psychological sequelae from his chronic pain after the July 1995 injury. The hearing officer determined that by accepting the settlement the claimant made an election of remedies regarding his psychological problems allegedly stemming from his compensable injury of _____.

ELECTION OF REMEDIES

The hearing erred in his finding that the claimant made an election of remedies under the facts of this case. First of all, we note that the lawsuit was brought to address matters relating to a 1991 injury, not the 1995 injury. The lawsuit was filed before occurrence of the injury in issue at the CCH. Consequently, the lawsuit was plainly not a “remedy” elected to address the 1995 injury.

Also, even if the lawsuit had been filed with respect to the 1995 injury, supplemental causes of action for discrimination under Section 451.001 are provided for within the 1989 Act and can hardly be characterized as elections *against* the right to income and medical benefits.

Finally, the case of Valley Forge Ins. Co. v. Austin, 65 S.W.3d 371 (Tex. App.-Dallas 2001, no pet. h.) indicates that the election of remedies doctrine does not apply to the 1989 Act. For these reasons, we reverse the determination that there was an election of remedies and render a decision that there was not.

WAIVER

The claimant contends that the carrier’s attempt to dispute the extent of injury fails to meet the requirements of Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.2(f) Rule 124.2(f) because the carrier’s denial, in its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), was a generic statement that did not adequately express the factual basis for the denial. However, because there is no requirement in the first place to file a TWCC-21 as a dispute to an extent of the injury (Rule 124.3(d)), and the rule further states that Section 409.021 does not apply in such cases, we cannot agree that general language in a TWCC-21 that is (gratuitously) filed to dispute an extent of injury constitutes a waiver. The hearing officer did not err by finding there was no waiver of the right to dispute the compensability of the extent of the claimant’s 1995 injury.

EXTENT OF INJURY

The hearing officer did not err in his determination that the compensable injury of _____, does not extend to include psychological problems (depression/chronic pain) and/or injuries to the cervical spine, left upper extremity, and/or lower back. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619,

620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The record in this case presented at best conflicting evidence for the hearing officer to resolve. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the decision and order with respect to the extent-of-injury issue.

The true corporate name of the insurance carrier is **BANKERS STANDARD INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.**

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge